

**U.S. Department of Labor**

Office of Administrative Law Judges  
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In the Matter of

ERNEST L. WHEELER  
Claimant

v.

WASHINGTON METROPOLITAN  
AREA TRANSIT AUTHORITY  
Employer

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS  
Party in Interest

Date Issued: August 6, 1999

Case No.: 1997 DCW 3

OWCP No.: 40-138845

**APPEARANCES:**

Mr. Jeffrey Swyers, Attorney  
For the Claimant

Mr. Alan D. Sundburg, Attorney  
For the Employer

**BEFORE:**

Richard T. Stansell-Gamm  
Administrative Law Judge

**DECISION AND ORDER**

This case involves a modification request by Mr. Ernest Wheeler to a claim he filed for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 - 950, as amended, ("the Act"), as made applicable by the District of Columbia Workers' Compensation Act, 36 D.C. Code §501.<sup>1</sup> In May and July of 1997, Administrative Law Judge Edith Barnett conducted

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<sup>1</sup>In 1979, the District of Columbia government repealed the 1928 District of Columbia Workers Compensation Act and established its own workers' compensation program. Consequently, only injuries occurring to employees in the District of Columbia prior to July 26, 1982, the effective date of the new program, are covered

two hearings considering the modification request. Regretfully, in December 1997, Judge Barnett passed away. On January 28, 1998, Associate Chief Judge James Guill notified the parties of his intention to reassign the case to another administrative law judge (ALJ 1).<sup>2</sup> In the absence of any objection, Judge Guill assigned the case to me on June 17, 1998 (ALJ 2 and ALJ 3).

My decision in this case is based on the testimony presented at the May and July 1997 hearings and the evidence admitted into evidence: CX (H1) -1 to CX (H1) -6;<sup>3</sup> EX (H1) -1 to EX (H1) - 15; EX (H2)-1 to EX (H2)-4; CX (H3)-1 to CX (H3) - 12;<sup>4</sup>and, EX (H3) -1 to EX (H3) - 18.<sup>5</sup>

### **Procedural History**

A review of the procedural history of this case will help clarify the issues presented for

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by the provisions of the Longshore and Harbor Workers' Compensation Act.

<sup>2</sup>The following notations appear in this decision to identify specific evidence: CX - Claimant exhibit; EX - Employer exhibit; ALJ - Administrative Law Judge exhibit, and TR - transcript. This case involves three hearings: October 1987, May 1997, July 1997. The exhibits are further identified by the following annotations: H1 - October 1987 hearing; H2 - May 1997 hearing; and, H3 - July 1997 hearing. For example, "CX (H 1)" - 1 refers to the claimant's exhibit number 1 from the October 1987 hearing.

<sup>3</sup>At the July 1997 hearing, Administrative Judge Edith Barnett informed the parties that her law clerk had requested a copy of the official record from the D.C. Department of Employment Services (TR (H3), pages 4 and 7). Unfortunately, that office no longer had the record so Judge Barnett indicated the parties would have to reconstruct the prior record. In response, Mr. Sundburg provided a copy of both the claimant's and employer's exhibits from Administrative Law Judge Victor Chao's 1987 hearing, which have been marked CX (H1) - 1 to CX (H1) -6 and EX (H1) -1 to EX (H1) - 15, and absent any objection, are admitted into evidence.

<sup>4</sup>CX (H3) - 10 to CX (H3) - 12 were received after the July 1997 hearing pursuant to Judge Barnett's instructions. Absent an objection the exhibits are admitted into evidence. Also in the May 1997 hearing, Mr. Swyers offered a letter from the U.S. Court of Appeals that was identified as claimant's exhibit number 6. Mr. Sundburg noted that same document was employer's exhibit number 4. Judge Barnett admitted claimant's exhibit number 6. Subsequently, at the July 1997 hearing, Mr. Swyers withdrew the previously admitted claimant's exhibit number 6 because it was a duplicate of EX (H2) -4 (TR (H3), page 9). Instead, Mr. Swyers submitted an MRI report as claimant's exhibit number 6, which is now CX (H3) - 6.

<sup>5</sup>As support for a portion of his October 7, 1997 reply post-hearing brief, counsel for the claimant attached a copy of an August 30, 1993 spine scan that was reported to Dr. Mosee. Since that document was not formally admitted into the record as evidence, I have not considered it in rendering my decision.

resolution.

#### First Injury - May 1978

On May 10, 1978, Mr. Wheeler, during the course of his employment with the Washington Metropolitan Area Transit Authority (“WMATA”), fell after he stepped on a manhole cover which gave way. Mr. Wheeler injured his back, left knee, and right wrist. After treatment for muscle strain of the spine, Mr. Wheeler’s doctor authorized him to return to work on May 18, 1979. During this period WMATA paid temporary total disability.

#### Second Injury - June 1979

On June 29, 1979, Mr. Wheeler, during the course of his WMATA employment, felt a sharp pain in his back while lifting a heavy load. WMATA paid temporary total disability benefits for a period of time.

#### First Administrative Law Judge Hearing And Decision - 1987

At a hearing conducted on October 28, 1987, Administrative Law Judge Victor J. Chao was presented with three issues: (1) whether any disability arose out of the June 29, 1979 injury; (2) the extent of any disability; and, (3) Section 8 (f) relief for the employer (EX(H2)-1 and EX (H3) -1). At the end of November 1987, Judge Chao issued a Decision and Order denying Mr. Wheeler’s claim for benefits. Due to inconsistencies in Dr. Dennis’ deposition and his use of pre-injury findings, Judge Chao gave less relative probative weight to his assessment that Mr. Wheeler suffered some disability from the June 1979 injury. Instead, Judge Chao relied on Dr. Gordon, Dr. Jenkins, Dr. Feffer, and Dr. Rockower, who after individual evaluations, opined there was no objective evidence to support a disability finding. Since Judge Chao found no disability, he did not address the Section 8 (f) issue.

#### Benefits Review Board Decision - 1990

The Benefits Review Board (“BRB”) on March 30, 1990 affirmed Judge Chao’s decision to deny benefits (EX (H2)-2 and EX (H3) - 2). The BRB found Judge Chao’s determination that there was no total disability due to the June 1979 accident was supported by substantial evidence consisting of the medical opinions from Dr. Gordon, Dr. Jenkins, Dr. Feffer, and Dr. Rockower. Judge Chao had the discretion to credit those assessments over the evaluations of Dr. Dennis and Dr. Horwitz.

#### U.S. Court of Appeals for the District of Columbia - 1991

On December 4, 1991, the U.S. Court of Appeals for the District of Columbia issued a

decision denying Mr. Wheeler's petition for review of the Benefits Review Board's decision (EX (H2)-3 and EX (H3) - 3). The court concluded the Administrative Law Judge's ("ALJ") conclusions were supported by substantial evidence. It was within the ALJ's discretion to credit the assessments of Dr. Jenkins, Dr. Feffer, and Dr. Rockower over the opinions of Dr. Dennis and Dr. Horwitz. And, in the absence of objective physical findings, the finding that Mr. Wheeler's pain symptoms were not disabling was supported by substantial evidence.

#### U.S. Court of Appeals for the District of Columbia - 1993

On June 15, 1993, the court denied Mr. Wheeler's April 23, 1993 request to reopen his case (EX (H2)-4 and EX (H3) -4).

#### Request for Modification - 1996

On December 13, 1996, the Labor Standards Office of the Government of the District of Columbia received a pre-hearing statement from Mr. Wheeler that he prepared without the assistance of counsel. Mr. Wheeler claimed disability due to bone fragments imbedded in the canal of his spine at L4-L5. He asserted that recent MRI and CT scan studies established his back problems. On January 7, 1997, a representative for the Associate Director of Labor Standards, U.S. Department of Labor ("DOL"), forwarded the pre-hearing statement to the Office of Administrative Law Judges ("OALJ") for a hearing under the provisions of 20 C.F.R. §702.331. In March 1997, after the case had been received by OALJ, employer's counsel, Mr. Alan Sundburg, filed a pre-hearing statement in response. He maintained that Mr. Wheeler's modification request was time barred and there was no connection between the alleged complaints and earlier injuries. Then, in April 1997, Mr. Jeffrey Swyers entered his appearance as counsel for Mr. Wheeler and submitted an amended pre-hearing statement, which adopted Mr. Wheeler's earlier submission and noted an abnormal condition of C4-5 level disc.

#### Second Administrative Law Judge Hearing - May 5, 1997

Pursuant to a February 24, 1997 Notice of Hearing (ALJ (H2)-1), Administrative Law Judge Edith Barnett conducted a hearing concerning this claim on May 5, 1997. Mr. Swyers, Mr. Wheeler, and Mr. Sundburg were present for the hearing. At the start of the hearing, the parties addressed Mr. Sundburg's request to remand the case for consideration of a new MRI completed in January 1997 that raised an issue of a cervical injury (ALJ (H2) - 2 and TR (H2), pages 4 to 8). Judge Barnett indicated that rather than remand the case, she would permit the employer additional time to develop further discovery concerning the MRI (TR (H2), pages 8 to 10). The parties then agreed to proceed with the hearing on the issue of whether Mr. Wheeler's Section 22 request for modification of his claim relating to the low back injury was time barred. Judge Barnett admitted into evidence multiple

documents<sup>6</sup> and Mr. Wheeler testified under oath. At the conclusion of this hearing, Mr. Sundburg moved to dismiss the modification request because it was untimely. Judge Barnett deferred a ruling on that motion.

### Third Administrative Law Judge Hearing - July 1, 1997

On July 1, 1997, Judge Barnett resumed the hearing in this case to specifically address the merits of Mr. Wheeler's claim.<sup>7</sup> Again, Mr. Swyers, Mr. Wheeler, and Mr. Sundburg were present. Mr. Wheeler again testified under oath and Judge Barnett admitted into evidence CX (H3) -1 to CX (H3) - 9<sup>8</sup> and EX (H3) -1 to EX (H3) -18.

### **Issues**

1. Whether Mr. Wheeler's Section 22 request for modification was timely.
2. If Mr. Wheeler's modification request was timely, whether Mr. Wheeler is entitled to disability benefits under the Act.
3. If Mr. Wheeler is entitled to disability benefits, whether the extent of the disability is partial or total.
4. If Mr. Wheeler is entitled to disability benefits, whether the employer is entitled to Section 8 (f) relief.
5. Whether Mr. Wheeler is entitled to reimbursement for medical expenses.

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<sup>6</sup>All the documents presented at this hearing were also admitted at the July 1997 hearing with one exception. CX (H2) - 6, a copy of the U.S. Court of Appeals denial of Mr. Wheeler's petition to reopen his case was admitted at the May 1997 hearing. However, in the July 1997 hearing, Mr. Swyers withdrew that exhibit because it was a duplicate of EX (H2) - 4. As a result, CX (H3) - 6 is a different document. See TR (H3), page 9. I also note the record contains only one set of the claimant's exhibits which are now included behind the July 1997 hearing transcript.

<sup>7</sup>The parties agreed that the issue of a cervical injury was no longer being raised (TR (H3), page 23).

<sup>8</sup>As previously mentioned, I've also admitted CX (H3) - 10 to CX (H3) - 12). CX (H3) - 5 consists of six items CX (H3) - 5A to CX (H3) - 5F.

## **Statement of the Case**

### **The Claimant's Position**

#### *Timeliness*

Mr. Wheeler did file a timely modification request with Judge Chao. Under the regulations, as interpreted by the Benefits Review Board, a person may file a modification request with an administrative law judge while a case is in active litigation or an appeal is pending. Although the U.S. Court of Appeals for the District of Columbia issued its judgment on December 4, 1991, the decision, due to court procedures, was not effective until December 25, 1991.<sup>9</sup> As a result, when Mr. Wheeler sent a letter to Judge Chao indicating his dissatisfaction with the denial of benefits on December 13, 1991 (CX (H3) - 5A), Judge Chao still had jurisdiction to consider that letter as a modification request.

Mr. Wheeler has introduced into evidence numerous letters which, when considered together, demonstrate that Mr. Wheeler mailed his request for modification in a timely manner. Essentially, whether Mr. Wheeler made a timely modification request is a factual determination and any doubt is to be resolved in the favor of the claimant.

Even if the modification request was deemed untimely, Mr. Wheeler is still entitled to pursue his claim for medical expenses because such a claim is never time barred.

#### *Entitlement to Benefits*

The denial of Mr. Wheeler's claim for benefits should be modified due to both a mistake of fact and a change in conditions. First, Judge Chao made a mistake in fact by indicating Mr. Wheeler's subjective complaints were not supported by objective medical evidence. Both Dr. Dennis and Dr. Horwitz presented medical opinions finding Mr. Wheeler had a 5% permanent partial disability. Dr. Dennis viewed Mr. Wheeler's disability as a summation of both the 1978 and 1979 injuries. Recent evidence also shows there was a mistake of fact with Judge Chao's decision. Mr. Wheeler continued to receive treatment from Dr. Dennis through 1992 for his low back pain. A January 1997 MRI showed loss of fluid at L4-L5 which is a low back injury. Also, Dr. Mosee's and Dr. Dennis' opinions should be given greater probative weight. Dr. Mosee's opinion is documented<sup>10</sup> and Dr. Dennis was treating physician for Mr. Wheeler at the time of the 1979 injury and during the next sixteen years. An award of benefits under the Act is also supported by the Social Security Administration's determination of disability which included a finding of a herniated disc constituting

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<sup>9</sup>In his initial post-hearing brief, counsel asserted the time period for filing a modification request ran from December 4, 1991 to December 4, 1992. However, in his reply post-hearing brief, counsel represented that the last day for filing a modification request was December 25, 1992.

<sup>10</sup>See footnote 5.

a severe impairment based on numerous medical reports. The WMATA's approval of Mr. Wheeler's disability retirement provides an additional basis for an award under the Act. WMATA made its determination based in part on Dr. Mosee's report and Mr. Wheeler's low back condition. Next, even though Mr. Wheeler worked from 1988 through 1991, he struggled with low back pain everyday. Finally, Mr. Wheeler's eighteen year history of low back pain and treatment for his low back problems warrants modification of the previous denial of benefits and the award of past and future medical expenses.

### The Employer's Position

#### *Timeliness*

To comply with the regulatory filing requirements of Section 22 and Section 19 of the Act, Mr. Wheeler had to file his modification request within one year of the denial of his claim for compensation with the deputy commissioner for the compensation program in the District of Columbia. Mr. Wheeler has failed to meet this requirement.

Based on the December 4, 1991 date of the U.S. Court of Appeals for the District of Columbia decision upholding the denial of Mr. Wheeler's claim, he had until December 4, 1992, to file his modification request. The record maintained by the deputy commissioner contains no evidence of any request for modification filed prior to 1996. In an attempt to establish that he filed a timely request, Mr. Wheeler presented handwritten letters (CX (H3) - 5A to CX (H3) - 5F). Any liberal application of the regulatory procedures goes solely to the content of the letters, whether they sufficiently rise to the level of a modification request, and not to the time filing requirement. In addition, three letters (CX (H3) - 5 D to CX (H3) - 5 F) were prepared well past the one year filing requirement. The other three letters (CX (H3) - 5 A to CX (H3) - 5 C) bear no indication they were ever filed with the deputy commissioner. The claimant asserts he sent the letters to Judge Chao; however, even though an administrative law judge may consider a modification request while an appeal is pending, the request must be sent first to the deputy commissioner.

#### *Entitlement to Benefits*

No mistake of fact or change in conditions exist to warrant modification. The medical evidence demonstrates there has been no change in conditions. The March 1979 myelogram was basically normal. A 1985 CT scan showed at L4-L5 minimal bulging of the disc without significant encroachment. An August 1987 lumbar spine MRI showed only a small bulge at L4-L5; there was no evidence of a disc herniation. A January 1997 MRI showed a minimal bulge at L4-L5, no herniated disc, and normal vertebral bodies. Dr. Mosee's opinion, which found a herniated disc at L4-L5, is inconsistent with the medical evidence in the record and the basis for his diagnosis is not indicated. Since 1979, the objective tests have been consistent and show no sign of herniation. Likewise, the claimant's doctor from 1989 through 1992 characterized Mr. Wheeler's condition as stable. Mr. Wheeler's subjective complaints of pain continued to be unsupported by medical

evidence. The determination of the Social Security Administration (“SSA”) and the WMATA Disability Retirement Board’s finding total disability should not be considered. Both determinations were based on Dr. Mosee’s unsupported diagnosis. Notably, the other medical evidence showing the absence of a herniated disc was not presented to these agencies. Also, the SSA award is based on a multitude of conditions, including uncontrolled hypertension, that are unrelated to his back injury.

Even If Mr. Wheeler is able to establish a change in conditions or mistake in fact, he is only partially disabled by the injury. Following both injuries in 1978 and 1979, Mr. Wheeler subsequently returned to work in a sedentary job as an information agent. His corresponding reduction in salary amounted to a little less than \$4,000 per year. In a related proceeding, the claimant had testified that he was able to perform his work as an information agent without any complaint regarding his low back injury.

Finally, in the event of a permanent disability award, the employer is entitled to Section 8 (f) relief. Due to the May 10, 1978 work injury, Mr. Wheeler had a pre-existing low back problem, consisting of a bulging L4 - L5 disc. Since Mr. Wheeler was working for the employer at the time of 1978 injury, the employer was aware of Mr. Wheeler’s low back problem. Then, as Mr. Wheeler continued his employment with the employer, he suffered another low back injury in the same location. As a result, his current disability is not due solely to the 1979 injury. Finally, Mr. Wheeler reached maximum medical improvement in 1980, so any entitlement to subsequent disability is properly considered permanent partial disability. Under Section 8 (f) the employer’s liability would then be limited to 104 weeks of such benefits.

### **Summary of the Evidence**

#### For the Claimant

#### *Sworn Testimony of Mr. Ernest Lee Wheeler*

Mr. Wheeler started working for the WMATA in February 1976. On May 10, 1978, he fell into a manhole at work. He suffered injuries to his low back, the top of his neck, his wrist and knee. Mr. Wheeler received medical treatment for these injuries for six weeks. Subsequently, he returned to work and experienced another injury in 1979 when he attempted to lift a dump truck tailgate by himself. The tail gate weighed about three to four hundred pounds and he felt his back snapped as he lifted the tailgate. Mr. Wheeler radioed his supervisor who took him to the hospital. He stayed in the hospital for eleven days. Since the first injury, Mr. Wheeler has never gone more than six months without being treated for his back problem. In December 1987, at the time of Judge Chao’s hearing, Dr. Dennis was providing medical treatment to Mr. Wheeler. (TR (H2), pages 22 to 24)

Following the May 1978 injury, Mr. Wheeler experienced low back pain. On the days he was working, Mr. Wheeler would notice sharp pains going down his legs at the end of the day. Some days, he couldn’t walk upright. When he attempted to lift heavy items, Mr. Wheeler would have



“very severe sharp pains” in his lower back. He received treatment for six weeks from Dr. Lapadula and then returned to work. But, because of the swollen wrist and continued low pain back pain, his supervisor wouldn’t let him work and referred him the WMATA medical office. WMATA referred Mr. Wheeler to Dr. Gordon, who eventually performed wrist surgery and sent Mr. Wheeler to Dr. Dennis for treatment of his back. Dr. Dennis believed Mr. Wheeler might have a pinched nerve, so Mr. Wheeler was hospitalized and placed in traction for ten days. At the time of the second injury, July 1979, Mr. Wheeler was still seeing Dr. Dennis every six to eight weeks. Mr. Wheeler was also taking medication prescribed by Dr. Dennis for his back. (TR (H3), pages 28 to 30)

Immediately after the July 1979 injury, Mr. Wheeler saw Dr. Dennis for treatment. From the job site, Mr. Wheeler went directly to the Washington Hospital Center, where he spent the next eleven days in traction. A little over three months later, Mr. Wheeler attempted to return to work. When he was told there was no light duty available, Mr. Wheeler went back to his regular job cutting grass. But, Mr. Wheeler had problems with a swelling in his lower back that prevented him from standing up straight. So he returned to Dr. Dennis for treatment and Dr. Dennis removed him from work. Mr. Wheeler didn’t return to work until about 1985 when his disability benefits stopped. Since he had a family to support, Mr. Wheeler had no choice. Again, WMATA did not have any light duty. WMATA did attempt to find a job for him outside the company; but, due to his back injury, other employers were not interested in him. In 1988, Mr. Wheeler returned to work with WMATA at a desk job, which involved a cut in pay of about \$7,000 a year. As part of his sedentary job, Mr. Wheeler operated a computer and a telephone. He was not required to do any heavy lifting. Mr. Wheeler worked off and on from 1988 to 1991. Eventually, because of his job knowledge, Mr. Wheeler became a part-time acting supervisor. He still had back problems and missed six to eight months of work because of his back injury. During this time frame, Mr. Wheeler remained under the care of Dr. Dennis. (TR (H3), pages 31 to 38, and 51 to 53)

Mr. Wheeler stopped seeing Dr. Dennis in 1992 because WMATA stopped paying his medical bills. Around that time, Mr. Wheeler suffered a muscle spasm in his back and went to the emergency room where he was referred to an orthopedic specialist, Dr. Mosee. Dr. Mosee became his treating physician. The D.C. medical assistance program paid his medical bills until he received his Social Security benefits. Soon thereafter, he switched back to Dr. Dennis and continued to see him about every two months, as of the July 1997 hearing. Dr. Dennis was treating him for herniation at L4-L5 (TR (H3), pages 38 to 40 and 46 ).

When Mr. Wheeler presented his Social Security disability claim in November 1991, he gave his attorney (not Mr. Swyers) Dr. Mosee’s treatment records. He believes the primary basis for his Social Security award was the back injury, although they gave “slight” consideration to his hypertension problem. The Social Security claims examiner explained that since Mr. Wheeler had to lay down two hours out of every eight hours and couldn’t do a lot of walking, sitting, or climbing, no employer would hire him (TR, page 40 to 41, and 48)

When Mr. Wheeler applied with WMATA for disability in November 1991, he saw Dr.

O'Donnell. He presented the Social Security report and a letter from Dr. Mosee and told Dr. O'Donnell about his low back pain. When Mr. Wheeler received his notice of disability retirement from WMATA, Dr. Mosee's 1993 report was attached. Mr. Wheeler believes Dr. O'Donnell only considered the Social Security report and Dr. Mosee's letter when she made her recommendation to approve his retirement application. At the time he applied for disability benefits from WMATA, Mr. Wheeler indicated his hypertension contributed to his disability and that he was having problems with his neck; he did not claim asthma as a cause of disability. Mr. Wheeler denied making a statement at the workers compensation hearing that his job did not aggravate his back. Mr. Wheeler saw a psychiatrist for his hypertension on the basis that the hypertension may be due to job stress. He was forced to work for lower wages and in pain every day. Mr. Wheeler believes the WMATA doctors are not truthful in their assessments of his condition (TR (H3), pages 47 to 50).

After receiving Judge Chao's December 1987 decision denying his claim, Mr. Wheeler attempted to contact someone about his claim by telephone. Mr. Wheeler was upset and felt there had been an injustice because he didn't believe the evaluations by the WMATA doctors that Judge Chao used were thorough or complete. Right away, he wrote letters to Judge Chao and the Workers' Compensation Board, "and a lot of my letters got returned unopened." And, a lot of the letters, he didn't receive back. After he had to go to the emergency room, Mr. Wheeler wrote Judge Chao again but "that letter was returned." Mr. Wheeler continued to write additional letters. Prior to 1991, he wasn't making copies of his letters to officials. Starting in 1991, his practice was to make copies of the original letter, send the copies out, and keep the original. He would leave name of the addressee blank on the original and write in the name on the copy that he mailed. The December 13, 1991 letter sets out his complaints about the medical examinations (See CX (H3) - 5A). Mr. Wheeler mailed a copy of that letter to Judge Chao and it was never returned. He received nothing in response. Mr. Wheeler sent additional letters to Judge Chao on February 27, 1992 and February 28, 1992 (See CX (H3) - 5 B and CX (H3) - 5 C). Each of these letters was placed in a stamped envelope and mailed. He also wrote to the chief judge. Mr. Wheeler knows he mailed the letters because he wouldn't write an eight page letter and then not mail it. His children's mother also mailed some letters for him. In addition, the fact some of the letters were returned, proves he mailed them. Mr. Wheeler also retained several other letters, including a letter, dated December 4, 1995 (See CX (H3) - 5D) that had a date stamp on the front page from the Office of Administrative Law Judges. Mr. Wheeler did not send a copy of this letter to the WMATA. Another letter, which was a photocopy of the December 4, 1995 letter to Judge Chao, was addressed to the deputy commissioner and eventually returned opened. Mr. Wheeler still had the envelope (See CX (H3) - 5E). There had been a stamp on the envelope but it was torn off. Mr. Wheeler mailed photocopies of the December 13, 1991, February 27, 1992, and February 28, 1992 letters to Judge Chao. He never received any response and the letters were not returned. He didn't put in Judge Chao's name on the original because he sent photocopies to other people. Other than a claims examiner at the Office of Workers Compensation, Mr. Wheeler doesn't recall who those other people are. Even though the February 27, 1992 letter is written to Judge Chao, Mr. Wheeler only put Judge Chao's name on the photocopy, which he mailed. On the first three originals, Judge Chao's name and mailing address are not on the documents; however, on the December 1995 letter, Mr. Wheeler did put Judge Chao's name and

office address on the original. Another letter contained three blank spaces for the three judges who heard his appeal (See CX (H3) - 5F and TR (H2), pages 24 to 31, 34 to 38, 50, 54 to 61, and 67).

In prior hearings regarding this claim, Mr Wheeler was represented by another lawyer, Mr. Brazil. The same lawyer represented Mr. Wheeler during his pursuit of his social security claim. And the same law firm represented Mr. Wheeler when he filed a worker's compensation claim against WMATA in 1991. The hearing on his compensation claim may have been held in July 1993. Prior to the first hearing in the present case, Mr. Wheeler had been examined by Dr. Rockower, Dr. Jenkins, and Dr. Feffer. He didn't complain about their treatment when he attended the first hearing; instead, he tried to present his complaint through the letters to the judges (TR (H2), pages 62 to 66).

*Social Security Award of Disability Benefits (CX (H3) - 1)*

On September 6, 1994, Mr. Wheeler received notice from the Social Security Administration of a fully favorable determination concerning his disability claim. Administrative Law Judge Robert Vaughan concluded, based on his findings of fact, that Mr. Wheeler was disabled as of November 21, 1991. The notice annotated numerous documents supporting the claim including several consultive medical examinations and other medical records. An attachment also indicates the presence of an affective disorder that caused moderate impairment.

*Dr. Charles Mosee's January 1993 and July 1994 letters (CX (H3) - 2 and - 3 and EX (H3) - 13)*

On January 14, 1993, Dr. Charles Mosee, a physician at the District of Columbia General Hospital, indicated in a letter that Mr. Wheeler had been his patient for the past year. Dr. Mosee diagnosed a central disc herniation at L4-L5 with an associated extruded herniation. For relief, Mr. Wheeler was taking anti-inflammatory drugs and muscle relaxants. Dr. Mosee found Mr. Wheeler disabled because he couldn't bend, stoop, reach anything, or lift more than ten pounds. In addition, Mr. Wheeler was unable to sit for long periods. Because Mr. Wheeler had not received "all the types of treatment for his condition," Dr. Mosee could not give a long term prognosis. Although surgery is the ultimate therapy, Mr. Wheeler had chosen a conservative approach prior to any surgery.

On July 7, 1994, Dr. Mosee signed a letter that copies the contents of the January 1993 letter.

*WMATA Notice of Disability Allowance (CX (H3) - 4)*

On March 1, 1996, WMATA approved a monthly disability retirement allowance for Mr. Wheeler in the amount of \$600. Attached to the notice is Dr. Mary O'Donnell's recommendation, dated November 5, 1995, that Mr. Wheeler be approved for a disability retirement. Another document records February 2, 1976 as Mr. Wheeler's date of employment. He received service credit

of nineteen years and eight months with a November 1, 1995 retirement date. The benefit calculation document shows the following wages: 1988 - \$11, 656; 1989 - \$26,748; 1990- \$25, 571; and , 1992 \$22,406. Finally, Dr. Mosee's January 14, 1993 letter is attached.

*Mr. Wheeler's December 1991 Letter (CX (H3) - 5A)*

This document is a handwritten, signed original, dated December 13, 1991. Between Mr. Wheeler's heading address, there are two blank lines and then the greeting, "Dear Judge." In the letter, Mr. Wheeler identifies his case by the number "90-1271."<sup>11</sup> Mr. Wheeler, after identifying himself begins the letter by writing, "After reviewing the decision you and two other judges reached. . ." He then explains his long term financial and work ordeals related to his back problem. Mr. Wheeler questions the thoroughness of the doctors who purportedly examined him. Mr. Wheeler indicates a recent x-ray shows a bulge in his disc and states that he seeks a just resolution of his claim.

*Mr. Wheeler's February 1992 Letter (CX (H3) - 5B)*

This document is a handwritten, signed original, dated February 27, 1992. Between the date and the salutation, "Dear Judge\_\_\_\_\_", are two blank lines. Mr. Wheeler introduces the letter by stating, "In the past you received a letter from me concerning case No. 90-1271." He then describes his continued back problems and mounting medical bills. Mr. Wheeler received treatment for high blood pressure and told a physician that being on the phone all day giving out bus and subway information would cause his blood pressure to rise. In fact, he's missed worked due to his blood pressure and sought help for his depression and anger.

*Mr. Wheeler's Second February 1992 Letter (CX (H3) - 5C)*

This document is a handwritten, signed original, dated February 28, 1992. Between the date and the salutation, "Dear Judge\_\_\_\_\_", are two blank lines. Mr. Wheeler uses the same introduction as the February 27, 1992 letter but this time points out his original injury occurred in May 1978. Between 1979 and 1988, Mr. Wheeler continued to look for work. But with Dr. Dennis' lifting restrictions, it was impossible to go back to being a landscaper. He received worker's compensation through 1985, but WMATA didn't pay all his medical bills. He was forced to return to work as a landscaper, despite his back pain, because benefits stopped. After a few weeks, his back swelled and Dr. Dennis put him off work again. Despite his own efforts to obtain word processing skills, WMATA never attempted to rehabilitate him. He applied for the information job with WMATA in May 1988. Finally, he asks the judge to consider whether he made the correct decision.

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<sup>11</sup>This case number references the U.S. Circuit Court of Appeals case number. The OALJ case number for Judge Chao's case was 86-DCW-175 and the OWCP number was 40-138845. The number of the case before the Benefits Review Board was BRB No. 88-100.

*Mr. Wheeler's December 1995 letter (CX (H3) - 5D)*

This is a copy of a signed undated, handwritten letter.<sup>12</sup> The top line lists the file number as 40-138845, the case number as DCW-175, and the case title, Ernest Wheeler v. WMATA. This copy carries an original date stamp from the Office of Administrative Law Judges of December 4, 1995. There is one blank line and then the following: "Judge Victor J. Chao, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210. Several more blank lines occur and then the letter begins, "Dear Your Honor." Mr. Wheeler starts the letter by objecting to the favorable decision for the employer in his case. He points out that since Judge Chao's decision, he has received a disability award from the Social Security Administration for his back injury. In addition, WMATA has approved a disability retirement for his back injury. He complains about the incomplete examinations by the WMATA doctors. Mr. Wheeler asserts he has a herniated L4-L5 disc with bone fragments imbedded in his spine. Mr. Wheeler attached portions of the SSA decision and information about the WMATA award.

*Mr. Wheeler's Letter to Ms. Bryant (CX (H3) - 5E)*

This letter is identical to the December 1995 letter with the following exceptions. First, there is no date stamp on the copy. Second, after the file number, case number and case name, the letter is addressed to Ms. Janice V. Bryant, Deputy Commissioner, Office of Workers' Compensation Programs, with a post office box number and Washington D.C. zip code. Third, an envelope addressed to Ms. Bryant is attached. On the front side, above the address, is a postal mark indicating "Return to Sender." The right hand corner of the envelope bears no marks of a postage stamp; instead, the notation "69¢" is present. The envelope has neither a postmark or cancellation mark.

*Mr. Wheeler's July 1993 letter (CX (H3) - 5F)*

This document is an original, signed, handwritten letter, dated July 16 1993. After the date and return address, there is one blank line and the salutation begins, "Judge \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_," and Mr. Wheeler writes, "Again, I am writing to you concerning case number 90-1271." Mr. Wheeler uses this letter to forward insurance forms and copies of medical reports from the hospital. He points out that he now has two herniated discs and an imbedded bone fragment.

*January 1997 MRI (CX (H3) - 6 and EX (H3) -14)*

An MRI of the lumbar spine taken January 23, 1997 shows the spinal canal is "capacious" and "dehydration of the L4 5 [sic] disc with minimum bulge but no evidence of disc herniation." The neural bodies and vertebrates were normal. This document also contains the results of a cervical MRI that revealed a "right sided disc herniation at the C 4 - 5 level."

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<sup>12</sup>This letter must have been written after the September 1994 SSA disability award and the November 1995 recommendation by Dr. O'Donnell for WMATA disability retirement.

*DOL December 1996 Letter to Mr. Wheeler (CX (H3) - 7)*

On December 2, 1996, the DOL Office of Workers Compensation Programs sent Mr. Wheeler a pre-hearing statement form.

*Dr. Dennis' and Dr. Horwitz's Medical Evaluations and Notes (CX (H1) -1, and portions of EX (H1) - 1 and EX (H3) - 5)*

On March 20, 1979, Dr. Michael W. Dennis, board certified in neurological surgery,<sup>13</sup> conducted a neurological examination of Mr. Wheeler for a back injury that occurred on May 10, 1978. Mr. Wheeler tripped over a manhole cover, fell backwards injuring his low back. Dr. Dennis noted Mr. Wheeler walked in a guarded fashion due to back stiffness. A few days later a myelogram "was essentially normal." The test revealed a "very mild bulge at the L4 - 5 level, not consistent with a ruptured disc." In an April 1979 visit, Mr. Wheeler noted improvement due to traction therapy. Notes from a May 1979 follow-up visit indicate Mr. Wheeler had residual back pain. On examination, however, Dr. Dennis found a full range of motion in the back and stated there were no objective physical findings to support Mr. Wheeler's subjective complaints. In light of the examination, Dr. Dennis recommended Mr. Wheeler return to work.

In June 1979, Dr. Dennis reported that Mr. Wheeler had attempted to return to work but he experienced discomfort and remained on sick leave. Dr. Dennis examined Mr. Wheeler but found no objective physical signs to substantiate his complaints. In July 1979, Mr. Wheeler returned to the hospital for additional traction. Mr. Wheeler responded well to the treatment and Dr. Dennis diagnosed "lumbosacral strain with no current physical findings."

Mr. Wheeler returned in September 1979, reported no relief from his medication and complained "bitterly" about his back and right leg pain. Dr. Dennis now characterized the prior myelogram as "abnormal" due to the bulge. He did not recommend surgery but suggested a more sedentary job for Mr. Wheeler. In October 1979, Dr. Dennis again noted a lack of significant physical findings. In another office visit in January 1980, Mr. Wheeler stated inactivity "considerably improved" his back pain. Dr. Dennis concluded Mr. Wheeler warranted no more than a 5% permanent partial disability from a whole body perspective. Mr. Wheeler was suitable for sedentary jobs that did not require sitting or standing for extended positions and lifting items weighing more than thirty pounds. During a July 1980 visit, Mr. Wheeler had no back complaint and Dr. Dennis stated he was "doing well." However, in August 1980, Mr. Wheeler experienced a flare up of his back pain. After bed rest, his condition improved. Again, Dr. Dennis found no change in Mr. Wheeler's condition.

In a February 3, 1981 office visit, Dr. Dennis recorded that although he was out of work, Mr.

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<sup>13</sup>Although I should have provided prior notice to the parties, I take judicial notice of Dr. Dennis' board certification. I have attached the certification documentation.

Wheeler was “doing well” even without medication. In July 1981, Mr. Wheeler presented with intermittent back pain. In March 1982 and September 1982 there was no material change in condition. During this period, Mr. Wheeler did have back and left thigh pain complaints.

On January 26, 1984, Dr. Norman H. Horwitz, a board certified neurological surgeon,<sup>14</sup> evaluated Mr. Wheeler. He complained of back muscle spasms due to cold weather. Dr. Horwitz found some forward bending restrictions, but indicated there was no fundamental change that would alter the disability rating. When Dr. Horwitz examined Mr. Wheeler again in August 1984, he noted “no essential change in this man’s condition.” Dr. Horwitz did not alter the 5% disability rating.

On August 15, 1985, Mr. Wheeler reported to Dr. Dennis that though he had residual leg and shoulder pain, he believed he could return to work without restriction. Dr. Dennis agreed that Mr. Wheeler could return in his “usual” capacity. However, Mr. Wheeler returned a month later in September 1985 stating his work aggravated his pain. Dr. Dennis found no objective evidence, but concluded Mr Wheeler did aggravate his condition. He still had a disability rating of 5%.

In a follow-up evaluation in March 1986, Mr. Wheeler stated he suffered from intermittent discomfort. Dr. Dennis recorded, “The patient remains symptomatic without objective parameters at present.” In December 6, 1986, Dr. Dennis reported another evaluation, stating Mr. Wheeler was “doing reasonably well” without any material change in his condition. Dr. Dennis cautioned Mr. Wheeler that heavy activity might aggravate his back pain. In January 1997, Mr. Wheeler indicated he experienced increased discomfort when he tried to return to work as a janitor. Dr. Dennis diagnosed a “subjective flare-up” of back pain.

*Dr. Dennis’ October 1987 Letter (CX (H3) - 8, EX (H1) -14, also contained in EX (H3) -5)*

On October 5, 1987, Dr. Michael W. Dennis describes his evaluation of Mr. Wheeler on March 20, 1979. A myelogram on March 23, 1979 showed a bulge at the L4-5 level. Mr. Wheeler was treated “in a conservative fashion” and returned to work. He received an additional injury in June 1979, causing a “flare-up of his back pain.” Based on this information, Dr. Dennis concluded Mr. Wheeler had a pre-existing condition that “materially and substantially aggravated the outcome of the June 1979 injury.” Mr. Wheeler’s disability was a summation of both the 1978 and 1979 injuries. Absent a bulging disc from the first incident, the second injury probably would not have lead to any permanent disability.

*Dr. Norman H. Horwitz’s 1983 Examination (CX (H1) -2, EX (H1) -1, and EX (H3) - 6)*

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<sup>14</sup>I take judicial notice of Dr. Horwitz’s board certification and have attached the certification documentation.

On May 18, 1983, Dr. Norman H. Horwitz re-evaluated Mr. Wheeler, who was experiencing occasional pain in his back. Mr. Wheeler was continuing with his exercises but was not taking medication. Dr. Horwitz found little tenderness in the back and no muscle spasms. He stated there was no change in Mr. Wheeler's condition and concurred with Dr. Dennis' 5% disability rating. Dr. Horwitz believed Mr. Wheeler was capable of work that did not involve extensive sitting, lifting over thirty pounds, or combat.

*April 1985 CT Scan of the Lumbar Spine (CX (H1) -3 and EX (H3) - 8)*

A CT scan taken April 27, 1985 showed "very minimal bulging" of the L4-L5 disc without any bony abnormalities or significant encroachment on the spinal nerve. The diagnosis was very mild degenerative disc disease at L4-L5.

*Dr. Dennis' May 1997 Letter (CX (H3) - 9)*

On May 28, 1997, Dr. Dennis noted that Mr. Wheeler's symptoms and back injury as described by Dr. Mosee were consistent with the ailment Dr. Dennis had treated for several years. According to Dr. Dennis, "The symptoms for which the patient is undergoing treatment are directly related to the injury he received in 1979." Dr. Dennis also concurred with Dr. Mosee's assessment of disability. At the same time, the cervical lesion was not work related.

*Dr. Dennis' 1987 Deposition (CX (H1) -5)*

In May 1987, Dr. Dennis testified about his treatment of Mr. Wheeler. Dr. Dennis first treated Mr. Wheeler in March 1979 for low back pain due to an injury on May 10, 1978. There was no history of previous back problems. Mr. Wheeler did suffer some sensory loss in the top of his foot that is part of the distribution for the L-5 nerve root. As a result, Dr. Dennis concluded Mr. Wheeler had a pinched nerve. A subsequent myelogram was abnormal because there was a bulge defect at the L4-L5 level. Dr. Dennis felt the bulge was clinically significant because it was accompanied by the foot numbness. By April 1979, Mr. Wheeler's symptoms had improved and there were no positive findings.

Following the second injury in July 1979, Dr. Dennis diagnosed back strain. Then, in light of the bulge and Mr. Wheeler's chronic pain complaints, Dr. Dennis believed sedentary work was appropriate for Mr. Wheeler. Dr. Dennis based his 5% disability on Mr. Wheeler's subjective pain complaints, which he believed were verifiable by the abnormal myelogram and nerve irritation. Through the January 1987 examination, Mr. Wheeler's condition remained unchanged. Dr. Dennis opined Mr. Wheeler could not return to his former WMATA occupation.

Mr. Wheeler had not consistently performed the back muscle exercises prescribed by Dr. Dennis. If Mr. Wheeler had followed the exercise regimen, his subjective complaints would be



reduced. Dr. Dennis acknowledged he also characterized the myelogram as essentially normal. Sometime after 1979, Mr. Wheeler's sensory loss diminished to the point that it was clinically insignificant. In fact, ever since the hospitalization in 1979, Mr. Wheeler had not exhibited physical symptoms. As a result, Dr. Dennis' disability rating was not based on any current physical finding. Instead, it was based on the initial abnormal myelogram and the original finding of nerve irritation. The fact Mr. Wheeler had recovered didn't alter the fact that there was an underlying abnormality which could be aggravated by inappropriate activity. Dr. Dennis indicated it is typical for a person with an L4 -5 level bulge to experience chronic back pain without associated clinical findings.

*Mr. Wheeler's 1986 and 1987 Applications for Positions (CX (H1) - 4)*

During 1986, Mr. Wheeler filled out applications for various positions ranging from transit sales clerk to clerk typist to special security officer. Again in 1987, Mr. Wheeler completed applications for several positions, including facility maintenance clerk, information clerk, and clerk typist. To support his application, Mr. Wheeler noted his recent completion of a twelve month community college business course.

*Administrative Law Judge Roland Vaughan's Decision (CX (H3) - 10)*

On September 6, 1994, Judge Roland Vaughan awarded disability benefits, effective November 21, 1991. He based the award on the following: "severe impairments: herniated disc, hypertension, and depression." These impairments prohibited Mr. Wheeler from prolonged sitting, standing and walking. Under the SSA standards, Judge Vaughan found Mr. Wheeler disabled.

*Payroll Leave Records and Associated Documentation (CX (H3) - 11)*

This exhibits records Mr. Wheeler's leave record. It annotates numerous absences between 1988 and 1991 related to back pain.<sup>15</sup> Toward the end of 1991, Mr. Wheeler was also out due to high blood pressure and headaches.

*Dr. Dennis' Correspondence, October 1989 to February 1991 (CX (H3) -12)*

An October 31, 1989 note by Dr. Dennis chronicles a follow-up office visit. A May 8, 1990 note documents Dr. Dennis' order confining Mr. Wheeler to bed rest for twelve days. And, in a short

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<sup>15</sup>The document contains numerous annotations and was presented without explanation. As a result, I am unable to decipher the exact amount of absences.

note, dated February 5, 1991, Dr. Michael Dennis notes that due to back pain, Mr. Wheeler has been unable to work since January 30, 1991. Dr. Dennis approved Mr. Wheeler returning to work on February 11, 1991.

*Document Subpoena 1987 (CX (H1) -6)*

This subpoena requires WMATA to produce Mr. Wheeler's entire personnel file.

For the Employer

*Dr. Dennis' Medical Reports on Mr. Wheeler March 1979 to April 1992; Includes  
Neurosurgical Consult by Dr. Pait (EX (H3) - 5)<sup>16</sup>*

In a March 1984 letter, Dr. Dennis described Mr. Wheeler's 5% permanent partial disability and noted that, despite subjective complaints, there had been no change in Mr. Wheeler's condition. He recommended vocational rehabilitation to enable Mr. Wheeler to perform sedentary work.

On October 5, 1987, Dr. Dennis summarized his treatment to date (see CX (H3) - 8). About a year later, Dr. Dennis had Dr. T. Glenn Pait, board certified in neurological surgery,<sup>17</sup> evaluate Mr. Wheeler due to his long history of back pain. Dr. Pait found Mr. Wheeler in no acute distress during the physical examination. He told Mr. Wheeler that an August 27, 1988 MRI showed a small central bulge at L4 - 5, with some disc degeneration, but there was no evidence of a disc herniation. Dr. Pait recommended avoiding heavy lifting or pulling and prescribed an anti-inflammatory drug and a muscle relaxer.

In May 1989, Dr. Dennis confirmed Mr. Wheeler had a recent MRI that showed a small central bulge at the L4 - 5 level with some degeneration. A December 1989 evaluation indicated a stable condition with some relief by use of a back brace. In April 1990, Mr. Wheeler reported increased discomfort due to his promotion to supervisor, which required more walking. Dr. Dennis found his condition stable, advised Mr. Wheeler to continue using a back brace and to obtain better shoes for support. Dr. Dennis also renewed his medication prescription. In September 1990, Mr. Wheeler was "considerably better." His occasional back pain responded to medication. In February 1991, Mr. Wheeler reported intermittent back pain and stated he couldn't afford his medication. Dr. Dennis found his condition stable and told Mr. Wheeler to continue his exercises. On April 22, 1992, Mr. Wheeler reported residual back pain. He was taking his medication and doing his exercises. Dr. Dennis' final impression was that "The patient is holding his own."

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<sup>16</sup>EX (H3) -1 to EX (H3) - 4 are summarized under the title "Other Exhibits." This section summarizes the portions of Dr. Dennis' evaluations that were not previously addressed under CX (H1) -1.

<sup>17</sup>I take judicial notice of Dr. Pait's board certification and have attached the certification documentation.

*Dr. Jenkins' 1985 and 1986 Medical Evaluations (EX (H1) - 5, EX (H1) -9, and EX (H3) - 7)*<sup>18</sup>

In April 1985, Dr. Ramon B. Jenkins, a board certified neurologist, conducted a medical record review and physical examination of Mr. Wheeler. Dr. Jenkins reviewed the treatment reports of Dr. Dennis, Dr. Horwitz, Dr. Lapadula, Dr. Hartsock, and Dr. Gordon. He also obtained Mr. Wheeler's work history and his descriptions of both accidents. On physical examination, Mr. Wheeler's back movements were "full and painless." Dr. Jenkins found no evidence of organic disease and indicated that a mild degree of bulging may be a completely normal finding. Dr. Jenkins did suggest a CT scan of the back.

Later Mr. Wheeler returned for an electro diagnostic study that did not reveal any abnormality. Dr. Jenkins stated, "Specifically, there is nothing suggestive of involvement of any lower lumbar nerve root." A CT scan showed "very minimal bulging" at the L4-5 level. Dr. Jenkins was confident the mild bulge was a normal finding. Dr. Jenkins found Mr. Wheeler had reached maximum medical improvement and declared him fit to return to his previous occupation without restriction.

Dr. Jenkins conducted another examination in January 1986 after Mr. Wheeler had returned to work for a few weeks in mid-1985 and then left due to back swelling. Dr. Jenkins again found a full range of motion in the lower back. He concluded Mr. Wheeler had "symptoms without abnormal physical findings." He again concluded Mr. Wheeler was fit to resume work without restrictions.

*Dr. Jenkins' 1987 Deposition (EX (H1) - 9)*

On May 20, 1997, Dr. Jenkins testified about his evaluations of Mr. Wheeler and review of the medical record. The results of Mr. Wheeler's physical examinations were normal. He concluded Mr. Wheeler was able to perform his occupation without limitations. The 1985 CT scan showing a very mild bulge is a normal finding in about 50% of the population. Again, in January 1996, a physical examination produced normal results. Based on all his evaluations and the CT scan, Dr. Jenkins concluded Mr. Wheeler had no residual disability from the June 1979 injury.

In considering Dr. Dennis' and Dr. Horwitz's work restrictions, Dr. Jenkins noted that no physical findings justified their recommended limitations on Mr. Wheeler's work. As a result, Dr. Jenkins did not include such restrictions in his report. He believed Mr. Wheeler could lift thirty pounds if necessary.

In Dr. Rockower's report, he found nothing mechanically or physically wrong with Mr. Wheeler. Dr. Rockower probably thought Mr. Wheeler was out of condition due to his inactivity. Dr. Rockower proposed a graduated approach to reintroducing Mr. Wheeler to normal life. Dr. Jenkins didn't believe that would be a good approach for Mr. Wheeler because the doctor had an

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<sup>18</sup>EX (H3) - 6 previously summarized at CX (H1) -2.

impression that Mr. Wheeler was not highly motivated. He developed that impression because Mr. Wheeler did not return to work even though several doctors examined him and found nothing wrong with his back. The CT scan after the June 1979 showed no evidence of a herniated disc and there was no evidence of a nerve root disorder. Dr. Jenkins would have sent Mr. Wheeler to a physical therapist for a couple of sessions to toughen up his back for work.

Dr. Jenkins believed both Dr. Dennis and Dr. Horwitz are very intelligent, highly ethical physicians. The fact that Mr. Wheeler might have a degenerative back problem does not make him more susceptible to a back injury. According to at least one study, a degenerative disc is an ordinary occurrence in the population. Dr. Jenkins remained firm in his conclusions because the objective tests through 1987 showed there were no neurological disorders and Mr. Wheeler's back condition was stable.

*Dr. Feffer's 1986 Medical Evaluation (EX (H1) -2, EX (H1) - 8, and EX (H3) - 9)<sup>19</sup>*

On January 27, 1996, Dr. Henry L. Feffer, board certified in orthopaedic surgery, evaluated Mr. Wheeler and his case. Dr. Feffer obtained Mr. Wheeler's work and accident history and then conducted a physical examination. Dr. Feffer considered Dr. Dennis' finding of 5% disability inconsistent with the objective medical evidence of only a minor bulge at L4 - 5. The updated x-rays and CT scans were within normal limits. On physical examination, Dr. Feffer noted Mr. Wheeler was healthy and had a full range of motion in his back. There was no sensory loss, weakness or atrophy. Dr. Feffer concurred with Dr. Jenkins that neither Mr. Wheeler's history nor the physical findings confirmed the existence of any significant disability. Accordingly, Dr. Feffer believed neither additional medical care nor job modification was necessary.

*Dr. Feffer's 1987 Deposition (EX (H1) - 8)*

Dr. Feffer testified that prior to examining Mr. Wheeler in January 1987, he reviewed the medical records in the case. His physical examination of Mr. Wheeler was normal. He found no physical reason for Mr. Wheeler's complaints of pain. As a result, he placed no restrictions on Mr. Wheeler's work activities. Absent any rationalization by Dr. Dennis and Dr. Horowitz, he found no basis for their stated restrictions on Mr. Wheeler's work. Dr. Feffer opined that Mr. Wheeler had no residual disability from his June 20, 1979 injury. He also disagreed with Dr. Rockower that some rehabilitation was necessary.

*December 1992 Medical Notes (EX (H3) - 10)*

On December 3, 1992, Mr. Wheeler was treated in the Washington Hospital Center Emergency Room for lower back sprain and needle-like pain down both legs. The attending

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<sup>19</sup>EX (H3) - 8 previously summarized at CX (H1) - 3.

physician, noted the back x-rays were negative. He recommended medication, quiet activity and a return to Dr. Dennis.

*Dr. Azzam's December 1992 Evaluation (EX (H3) - 11)*

Dr. Charles J. Azzam, board certified in neurological surgery,<sup>20</sup> evaluated Mr. Wheeler on December 9, 1992 following an aggravation of Mr. Wheeler's back problem during a cardiac stress test. Mr. Wheeler was improving after his emergency room visit. Dr. Azzam found some restriction in Mr. Wheeler's range of motion. He noted Mr. Wheeler was responding well to medication and encouraged him to continue with his back muscle exercises.

*WMATA Treating Physician Employment Status Report (EX (H3) - 12)*

On January 9, 1992, a physician (I am unable to ascertain the complete name from the signature) completed a WMATA Treating Physician Employment Status Report stemming from a November 1991 injury date. The doctor recommended Mr. Wheeler refrain from all work activity due to major depression, an anxiety disorder and occupational related stress.

*WMATA Personnel Action Reports (EX (H3) - 15)<sup>21</sup>*

On May 16, 1988, Mr. Wheeler assumed a new position as a transit sales and information agent, with an annual salary of \$20,498. The documents state the action is a transfer and demotion from his previous job as a landscape worker, with an annual salary of \$24,356.

*Dr. O'Donnell's October 1995 Comments Concerning Mr. Wheeler's Application for Disability Retirement (EX (H3) - 16)*

On October 5, 1995, Dr. Mary O'Donnell notes Mr. Wheeler's request for a disability discharge. Mr. Wheeler had been treated by a mental health physician for about a year. But, since the medical bills weren't paid, the doctor refused further appointments. Mr. Wheeler also mentioned medical treatment for high blood pressure and a herniated disc. He no longer took depression medication due to its expense. Mr. Wheeler stated the basis for his disability retirement was high blood pressure, herniated disc with associated chronic back pain, and depression.

*August 1995 Compensation Order Denying Benefits (EX (H3) - 17)*

Around 1993, Mr. Wheeler applied for disability benefits under the District of Columbia

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<sup>20</sup>I take judicial notice of Dr. Azzam's board certification. The certification documentation is attached.

<sup>21</sup>EX (H3) - 13 was previously summarized under CX (H3) -2 and -3. EX (H3) -14 was discussed under CX (H3) -6.

workers compensation statute. Mr. Wheeler sought to obtain workers' compensation starting from November 21, 1991 and associated medical expenses on the basis that the stress in dealing with difficult customers as an information agent aggravated his pre-existing hypertension. Mr. Wheeler believed the hypertension became disabling. Mr. Wheeler stopped work fearing the continued hypertension would harm his body.

After making findings concerning the history of Mr. Wheeler's employment with WMATA, the hearing examiner found Mr. Wheeler had a pre-existing hypertension condition. However, based on a medical opinion noting that the hypertension did not abate after he stopped working, the examiner determined Mr. Wheeler's work did not aggravate his "essential hypertension." As a result, Mr. Wheeler did not sustain an injury under the District of Columbia Workers' Compensation Act of 1979.<sup>22</sup>

*June 1997 Letter from the Department of Employment Services (EX (H3) -18)*

A claims examiner for the Department of Employment Services stated that a thorough search of the office's files failed to produce any claim form for compensation presented by Mr. Wheeler.

*Dr. Gordon's 1978 and 1979 Medical Notes (EX (H1) - 3)<sup>23</sup>*

In May 1978, Dr. Robert O. Gordon, board certified in orthopaedic surgery,<sup>24</sup> evaluated Mr. Wheeler for wrist, knee, and back pain. Dr. Gordon observed tenderness in the wrist and knee. He diagnosed sprain of the low back, right wrist, and left knee. By June 1978, Mr. Wheeler had returned to work but stated his back hurt at the end of the day. Dr. Gordon achieved inconsistent findings and saw no evidence of nerve damage. In October and November 1978, Mr. Wheeler still had back pain complaints. Dr. Gordon stated the exam and x-ray were normal and there were no objective findings. Dr. Gordon believed Mr. Wheeler was exaggerating his symptoms. Dr. Gordon returned Mr. Wheeler to work in November 1978.

On March 9, 1979, Dr. Gordon tested Mr. Wheeler again for nerve damage and obtained a normal result. Although he found no objective evidence, Dr. Gordon referred Mr. Wheeler to Dr.

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<sup>22</sup>See footnote 1.

<sup>23</sup>EX (H1) -1 has been discussed at CX (H1) -1, CX (H3) - 5, and CX (H1) -2.

<sup>24</sup>I take judicial notice of Dr. Gordon's board certification and have attached the certification documentation.

Dennis for evaluation. By May 1979, Mr. Wheeler had returned to work but struggled with back pain when bending and lifting. In August 1979, Dr. Robert O. Gordon examined Mr. Wheeler. According to Mr. Wheeler the recent myelograms showed two ruptured disc. Dr. Gordon however confirmed with Dr. Hartsock that the test result was normal. Every time Mr. Wheeler attempted to go to work, he had to stop due to back pain. He did well as long as he avoided strenuous activity. He could only play a few games of basketball. On physical examination, Dr. Gordon found no objective evidence of any problem. Dr. Gordon noted his conclusion was consistent with Dr. Dennis who likewise made no objective findings. Dr. Gordon concluded Mr. Wheeler could return to his regular work. He believed Mr. Wheeler should be encouraged to do his regular work until some “objective abnormalities” appeared.

*Dr. Hartsock’s 1979 Medical Report (EX (H1) - 4)*

Dr. Frederick B. Hartsock, a board certified surgeon,<sup>25</sup> first observed Mr. Wheeler in October 1978 when he felt a sharp pain in his back while shoveling grass. Dr. Hartsock believed Mr. Wheeler was temporarily disabled due to chronic lumbar strain. Following Mr. Wheeler June 29, 1979 injury, Dr. Hartsock diagnosed lumbosacral strain. He again examined Mr. Wheeler on July 16 and 24, 1979 and placed him on disability for a period of one to two weeks.

*Dr. Lapadula’s Medical Evaluation (EX (H1) - 6)*

Dr. Michael F. Lapadula, a board certified surgeon,<sup>26</sup> treated Mr. Wheeler immediately following the first injury on May 10, 1978. Dr. Lapadula found tenderness and muscle spasms in the L-3 to S-2 level. The x-ray was normal. From May 11 to May 19, 1978, the doctor continued his treatment of Mr. Wheeler and then returned him to full duty.

*Dr. Rockower’s 1986 Medical Evaluation and 1987 Progress Report (EX (H1) - 7)*

On June 23, 1986, Dr. Stephen J. Rockower, board certified in orthopaedic surgery,<sup>27</sup> conducted an orthopedic examination. As part of the evaluation, Dr. Rockower reviewed Mr. Wheeler’s medical history since the first injury in May 1978, which included numerous medical

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<sup>25</sup>I take judicial notice of Dr. Hartsock’s board certification and have attached the certification documentation.

<sup>26</sup>I take judicial notice of Dr. Lapadula’s board certification and have attached the certification documentation.

<sup>27</sup>I take judicial notice of Dr. Rockower’s board certification and have attached the certification documentation.

evaluations and tests. Mr. Wheeler indicated he suffered a very sharp back pain on an occasional basis when being active. The examination was normal and Dr. Rockower concluded Mr. Wheeler had low back pain without evidence of any organic disease. Dr. Rockower suggested Mr. Wheeler be placed in a program that would teach him how to exercise his back and alter his behavior so he could return to work. Over the long term, there would not be any work restrictions. However, Mr. Wheeler needed some light duty initially when he started work again. Dr. Rockower stated Mr. Wheeler did not have a permanent partial disability as a result of the May 1978 injury as aggravated by the June 1979 injury.

Dr. Rockower accomplished a follow-up evaluation in April 1987. Mr. Wheeler was not working. He complained about back pain. After a physical evaluation, Dr. Rockower concluded Mr. Wheeler had continued back pain without any objective findings.

*Labor Market Survey, 1987 (EX (H1) - 10)*

The Labor Market Survey completed for the week of May 14, 1987, based on Mr. Wheeler's transferable skills and a work restriction requiring sedentary or light duty, showed numerous available jobs from clerk/typist to inventory clerk to building maintenance attendant to office assistant.

*Rehabilitation Status Report, 1986 and 1987 (EX (H1) -11)*

These reports from September 1986 through January 1987, document the employer's efforts to rehabilitate Mr. Wheeler and help him gain other employment. A rehabilitation specialist prepared a job development and job placement program, arranged for several job interviews, and approved additional vocational training, including a typing course.

*Rehabilitation Status Report, 1984 (EX (H1) - 12)*

These reports from June 1984 through August 1984 chronicle the employer's effort to return Mr. Wheeler to gainful employment. The rehabilitation specialist assessed Mr. Wheeler's transferable skills, and found him employable. Mr. Wheeler expressed his desire to remain at WMATA. However, the specialist did not observe any effort in that direction. She also characterized his cooperation as marginal. The specialist contacted numerous employers who expressed an interest in Mr. Wheeler's vocational abilities, despite knowledge of his physical limitations. The specialist helped Mr. Wheeler prepare a resume and arranged job interviews.

*Labor Market Survey Addendum, 1987 (EX (H1) -15.*

An updated Labor Market Survey in October 1987 identified several jobs available at WMATA. A specialist filed Mr. Wheeler's applications for several open WMATA jobs. The updated survey listed several additional job opportunities including assistant telephone operator and rental agent.



### *Other Exhibits*

Judge Chao's December 8, 1987 Decision and Order (EX (H2) - 1 and EX (H3) - 1); the March 30, 1990 Benefit Review Board decision (EX (H2) - 2 and EX (H3) - 2); the December 4, 1991 decision of the U.S. Court of Appeals for the District of Columbia (EX (H2) - 3 and EX (H3) - 3); the June 15, 1993 re-hearing denial by the U.S. Court of Appeals for the District of Columbia (EX (H2) - 4 and EX (H3) - 4); and, a typing course certificate (EX (H1) - 13).

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

At the various hearings, the parties have entered into the following stipulations (EX (H2) - 1; TR (H3), pages 12 to 13):

1. The parties are subject to the Act and, at the time of the June 1979 injury, an employer-employee relationship existed between the parties.
2. The low back injury that occurred on June 29, 1979 arose out of and in the course of Mr. Wheeler's employment.
3. The notice of injury, request for compensation, employer's first notice and notice of controversion regarding the June 29, 1979 injury were timely.
4. The average weekly wage was \$280.90.
5. The employer paid temporary, total disability from June 30, 1979 to August 7, 1979 and from October 1, 1980 to June 13, 1985.
6. Through October 1987, the employer had paid medical expenses related to the June 29, 1979 injury.
7. Mr. Wheeler suffered a low back injury while on the job on May 10, 1978.
8. The notice of injury, request for compensation, and notice of controversion regarding the May 10, 1978 injury were timely.

### Evidentiary Discussion

Prior to adjudicating the issues in this case, I must address three evidentiary matters regarding evidence presented in this case. First, I will not consider Judge Vaughan adjudication (CX (H3) - 1 and CX (H3) - 10) binding because my adjudication involves different issues, statutes, standards, and evidence. Judge Vaughan determined disability under the Social Security Administration's laws and

regulations. The case before me involves a claim presented under the Longshore and Harbor Workers' Compensation Act and related DOL regulations. For example, Judge Vaughan may find disability compensation appropriate for injury or disease unrelated to work. On the other hand, my adjudication covers only work related injury or disease. Also, Judge Vaughan's finding of disability is not particularly probative since he based his decision in part on impairments other than back injuries.

Second, I will not be bound by the WMATA disability retirement action. Again, while WMATA made its determination under a distinct set of guidelines established by a labor contract, I am bound by the statutory requirements of the Act and related regulations. In addition, considering Mr. Wheeler presented high blood pressure and depression in addition to his back problem to support his disability application (EX (H3) - 16), I believe the WMATA decision was not solely based on Mr. Wheeler's bad back.

Third, for similar reasons, I will not be bound by the 1995 District of Columbia compensation order denying benefits (EX (H3) -17). Besides being adjudicated under a different statute, that decision focused primarily on whether Mr. Wheeler's hypertension was a compensable disability claim.

#### Issue #1 - Timely Modification

Under Section 22 of the Act, 33 U.S.C. § 922, and 20 C.F.R. § 702.373 (c), any interested party may, within one year of the rejection of a claim, request modification of an order based on a change in conditions (physical or economic) or a mistake of fact.<sup>28</sup> *O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 245 (1971) and *Rizzi v. Four Boro Contracting Corp.*, 1 BRBS 130 (1974). The request need not be formal, but the contents must alert a reasonable person that the earlier compensation order might warrant modification due to a change in conditions or a mistake of fact. *I.T.O. Corp. of Virginia v. Pettus*, 73 F.2d 523 (4<sup>th</sup> Cir. 1995), *cert. denied*, 117 S.Ct. 49 (1996). The request does not necessarily have to be in writing. In one case, a telephone call to the district director who memorialized the claimant's statement that he suffered a change in conditions and sought additional compensation was deemed sufficient. *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1981). The claimant is not required to specifically state that the basis of the request is a change in condition or a mistake of fact. *Cobb v. Marine Terminal Corp.*, 2 BRBS 282 (1975), *aff'd sub. nom.*, *Cobb v. Schrimmer Stevedoring Co.*, 577 F.2d 750 (9<sup>th</sup> Cir. 1978). Essentially, a communication will be considered a modification request if it conveys a claimant's dissatisfaction with a compensation order. *Cobb v. Schrimmer Stevedoring Co.*, 2 BRBS 132 (1975) *aff'd* 577 F.2d 750 (9<sup>th</sup> Cir. 1978).

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<sup>28</sup>A party seeking to modify a decision on the basis of mistake of fact is not barred from modification even if the prior award based on the alleged mistake was affirmed on appeal. *Hudson v. Southwestern Barge Fleet Servs.*, 16 BRBS 367 (1984).

The one year time period within which a modification of a denial of claim may be considered begins to run on the date the decision denying the claim becomes final. If the denial decision was appealed, then a claimant has one year after completion of the appellate process to seek modification of the denial. *Black v. Bethlehem Steel Corp.*, 16 BRBS 138, 142-43 n.7 (1981), *appeal dismissed sub. nom.*, *Black v. Director, OWCP*, 760 F.2d 274 (9<sup>th</sup> Cir. 1985).

An administrative law judge is not divested of jurisdiction while an appeal is pending. *Miller v. Central Dispatch*, 16 BRBS 63 (1984). An administrative law judge has broad discretion in considering a modification and may base his or her decision on wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.<sup>29</sup> *O'Keefe*, 404 U.S. 254. On the other hand, when no appeal is pending or an appeal has already been decided, a modification petition is properly initiated with the district director. *Arbizu v. Triple A Mach. Shop*, 15 BRBS 46 (1982).

The claim file that Judge Barnett initially received contained no correspondence that had been received by the DOL or Judge Chao that might be considered a timely request for modification. As a result, Mr. Wheeler has presented several letters and his sworn testimony to establish he made a timely modification request. While the absence of correspondence in the claim file indicating receipt of his letters does not necessarily defeat his assertion that he sent them, Mr. Wheeler bears the burden of proof to establish by the preponderance of the evidence that a timely modification request was delivered within one year of the final rejection of his claim.

As a preliminary step, I must determine the one year window of opportunity for Mr. Wheeler to file his modification request. Mr. Swyers believes the one year period ran from December 24, 1991. Mr. Sundburg represents the starting date is December 4, 1991. When the U.S. Court of Appeals for the District of Columbia issued its decision on December 4, 1991 (EX (H2) - 3 and EX (H3) - 3), it noted that the mandate would be withheld until seven days after the disposition of any timely petition for rehearing. Since a party under court practice had fourteen days to appeal, the decision would not be effective for at least two weeks, until December 18, 1991. However, since Mr. Wheeler did not present a timely appeal, the additional seven days is not necessary. Accordingly, I find Mr. Wheeler's claim was finally rejected by the appellate affirmation of Judge Chao's decision on December 18, 1991. Mr. Wheeler had until December 18, 1992 to request a modification.

Of the six letters presented by Mr. Wheeler, only the December 13, 1991, February 27, 1992 and February 28, 1992 letters (CX (H3) - 5 A to CX (H3) - 5 C) were accomplished prior to the modification cut-off date of December 18, 1992.<sup>30</sup> There really is no dispute that the content of each of the three letters represents a modification request. Mr. Wheeler clearly expressed his

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<sup>29</sup>If the basis for the modification is change in condition, then new and cumulative evidence is considered.

<sup>30</sup>The reference in the two other letters (CX (H3) - 5 D and CX(H3) - 5 E) to the approval of his retirement by the employer (Dr. O'Donnell made that recommendation in November 1995) and the July 1993 date on the third letter ((CX (H3) - 5 F) clearly shows Mr. Wheeler wrote the letters after December 18, 1992.

dissatisfaction with the denial of his claim for benefits. He expressed his belief that the medical opinions of several doctors were not reliable because they did not accomplish thorough examinations.

He also stated new evidence existed that supported his claim. I find Mr. Wheeler's letters of December 13, 1991, February 27, 1992, and February 28, 1992 are modification requests. The issue I have to resolve is whether any of the three letters were timely.<sup>31</sup>

Standing alone, the December 13, 1991, February 27, 1992, and the February 28, 1992 letters, which do not contain the name and address of the intended addressee, do not establish actual delivery of those documents in a timely manner. Consequently, whether Mr. Wheeler is able to meet his burden of proof depends significantly on his veracity and the accuracy of his memory. Although I have no basis to doubt his integrity as a witness, the accuracy of Mr. Wheeler's memory is placed into question by several factors.

First, much of Mr. Wheeler's recollection about his correspondence is vague at times and then selectively certain. He addressed copies of his letters to various judges and agencies, but doesn't recall the names. He does, however, specifically recall sending a copy to Judge Chao. He remembers some of the letters were returned unopened; but generally doesn't recall which letters came back. On the other hand, Mr. Wheeler does know the three letters he sent to Judge Chao in 1991 and 1992 were never returned. Mr. Wheeler couldn't remember the addresses he used for the copies of the first three letters, yet he's certain Judge Chao's address was on the envelopes containing a copy of each of the three letters.

Second, to explain why he specifically remembers sending a letter to Judge Chao, Mr. Wheeler testified, ". . . the one February 27<sup>th</sup>, I know for a fact that this one was mailed to Judge Chao because I would let him know that in the past I have written him before concerning the matter." (TR (H2), page 31). However, Mr. Wheeler's recollection is not consistent with the content of the first three letters. In evaluating the contents of the three letters, including the letter dated February 27, 1991, it's clear Mr. Wheeler was writing a series of letters to the Circuit Court of Appeals judges and not Judge Chao. Mr. Wheeler identifies himself in all three letters with the Court of Appeals' case number. He states in the first letter of December 13, 1991 (CX (H3) - 5 A), "After reviewing the decision you and two other judges reached. . ." Then, in his second letter of February 27, 1992 (CX (H3) - 5 B), Mr. Wheeler, in an effort to identify himself, starts by writing, "In the past you received a letter concerning case no. 90-1271, Wheeler v. WMATA." The third letter, dated February 28, 1992, also begins with the statement, "In the past I wrote to you concerning case number 90-1271, Wheeler v. WMATA."

Third, one of the exhibits presented by Mr. Wheeler was a returned letter and envelope (CX (H3) - 5 E). When asked whether the envelope had a stamp, Mr. Wheeler, after examining the

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<sup>31</sup>Mr. Swyers maintained that on this issue any doubt should be resolved in favor of Mr. Wheeler. I note that the long standing "true doubt" rule was rejected by the U.S. Supreme Court in *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251 (1994), *aff'g sub. nom., Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993).

envelope, replied, “There was . . . [but] you can see where it was torn off.” My examination of the same envelope shows the absence of any evidence of postage having been attached. Significantly, there is no postmark or evidence of cancellation. Instead, the upper right corner of the envelope has annotation of “69 ¢” and the center of the letter is marked with a “return to sender” hand sign. Contrary to Mr. Wheeler’s assertion, I find the envelope and its contents were returned to him due to a lack of postage. The envelope provides stark evidence that while Mr. Wheeler may have mailed his letters as claimed, he did not always pay sufficient attention to detail to ensure they were effectively delivered.

Fourth, Mr. Wheeler submitted a copy of a letter to Judge Chao that was returned to him with a November 1995 date stamp from the Office of Administrative Law Judges (TR (H2), page 35, and CX (H3) - 5 D). Because the claim file did not also contain a copy of this letter, the date-stamped copy in Mr. Wheeler’s possession demonstrates that the absence of a document in the file doesn’t prove it was never mailed. While I certainly agree with that proposition and have consider that aspect, I also note that this particular letter also establishes a point contrary to Mr. Wheeler’s position. This particular letter shows, that at least once, when the staff at the Office of Administrative Law Judges actually received a document from Mr. Wheeler, they replied by sending him a date-stamped copy as proof of receipt. Notably, Mr. Wheeler testified he received no response from the Office of Administrative Law Judges to his three letters from 1991 and 1992 (TR (H2), page 42).

Individually, each of the above factors might not negate Mr. Wheeler’s efforts to prove a timely modification request. Their cumulative effect, however, is sufficient to diminish my confidence in the accuracy of Mr. Wheeler’s recollection. Accordingly, I find Mr. Wheeler’s sworn testimony concerning the December 13, 1991, February 27, 1992, and February 28, 1992 letters is insufficient to support a finding that Mr. Wheeler’s letters were received by either the DOL or Judge Chao.

To protect his right of modification under the Act, Mr. Wheeler had an obligation to ensure delivery of his correspondence. Instead of sending his letters by certified mail/return receipt, Mr. Wheeler chose to rely on regular mail, without any other type of verification of receipt. When Mr. Wheeler didn’t receive a response to his letters of December 1991 and February 1992, he still had several months to determine whether his letters had been received. Nonetheless, Mr. Wheeler apparently took no other action to determine proper delivery. There’s no testimony or evidence that, during the one year modification period, Mr. Wheeler attempted to contact by telephone, the Office of Administrative Law Judges, the clerk of the Circuit Court of Appeals, the Benefits Review Board, or even the DC Workers’ Compensation Office concerning the receipt of his three letters.

Based on a preponderance of evidence, I find Mr. Wheeler intended to send a timely modification request, attempted to send such a request, but failed to make an effective delivery of the request in a timely manner. Accordingly, the Employer’s Motion to Dismiss the modification request as untimely should be granted.

Absent a timely request for modification, the denial of Mr. Wheeler’s claim for disability

benefits under the Act, as affirmed by the U.S. Court of Appeals for the District of Columbia, remains in effect.

### **Issue #5 - Medical Benefits<sup>32</sup>**

Under Section 7 (a) of the Act, 33 U.S.C. § 907 (a), the employer must provide medical treatment “for such period as the nature of the injury or the process of recovery may require.” In order to hold the employer liable for medical expenses, the treatment must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). If the treatment is unnecessary for the injury, payment may be rejected. *Ballesteros v. Williamette W. Corp.*, 20 BRBS 184, 187 (1988). On the other hand, if an administrative law judge determines a procedure is reasonable and necessary, then he or she may direct an employer to authorize a specific future medical treatment or procedure. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991). Medical benefits are available to employees who have suffered a work-related injury even if that injury does not satisfy the requirement for entitlement to disability benefits. *Ingalls v. Director, OWCP*, 991 F. 2d 163 (5<sup>th</sup> Cir. 1993). Once an employer has refused to provide treatment or satisfy a claimant’s request for treatment, the claimant is released from the obligation of continuing to seek the employer’s approval. *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988). Claims for medical expenses are never time-barred. *Dear v. Marine Terminals Corp.*, 7 BRBS 234, 238 (1977).

The parties have stipulated that Mr. Wheeler suffered two injuries to his lower back in May 1978 and June 1979 in the course of and during his employment with WMATA. The extensive medical record in this case tracks Mr. Wheeler’s struggle with the pain associated with his low back injuries. Nearly all the physicians who examined Mr. Wheeler concluded there were no significant objective findings related to Mr. Wheeler’s subjective complaints. At that same time, there was a significant difference of opinion concerning the reality of his low back pain.

Turning first to Dr. Jenkins and Dr. Feffer, they believed Mr. Wheeler either had reached maximum medical improvement or didn’t need additional medical treatment. In considering the relative probative value of their assessments, I notice that neither doctor directly challenged the reality of Mr. Wheeler’s back pain or opined that Mr. Wheeler was malingering. Because they didn’t resolve the issue of Mr. Wheeler’s pain, I give their conclusions less probative weight on this issue. Dr. Gordon did go directly to the point and expressed a belief after the May 1978 injury that Mr. Wheeler might be exaggerating his symptoms. Although his assessment is documented and reasoned, I find his conclusion is outweighed by the documented and reasoned opinions of several other doctors who treated Mr. Wheeler for back pain. Clearly Mr. Wheeler’s treating physicians, Dr. Dennis and Dr. Mosee, and another doctor during an emergency room visit by Mr. Wheeler, considered his pain real enough to prescribe exercises, therapy, and medication. Dr. Rockower also believed some rehabilitation effort was necessary to help Mr. Wheeler cope with back pain. And, Dr. Azzam

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<sup>32</sup>Because I determined Mr. Wheeler did not submit a timely modification request and the denial of his claim for disability benefits remains effective, I do not need to address Issues #2, 3, and 4.

observed that Mr. Wheeler's back pain in 1992 was responding well to medication and exercises. Having considered the breadth and depth of medical opinion in this case, I find preponderance of the medical opinion evidence supports a finding that Mr. Wheeler had continuing, periodic bouts of low back pain that required medical attention. Although the low back pain may not have been disabling, it was real. The medical record in this case is insufficient to conclude Mr. Wheeler's low back pain was contrived or imagined.

The employer stopped approving medical treatment in October 1987, the same month as Judge Chao's hearing. Since that date, several doctors, including Dr. Dennis and Dr. Mosee have continued to treat Mr. Wheeler for his low back pain. The physicians have prescribed various exercises, periodic check-ups, and medication consisting of anti-inflammatory drugs and muscle relaxants. As Dr. Dennis noted in numerous evaluations into the 1990s, and Dr. Azzam observed in a 1992 evaluation, this medical regimen assisted Mr. Wheeler in coping with the low back pain related to his injuries. Based on my review of the medical evidence, and in the absence of sufficient evidence to the contrary, I find Mr. Wheeler's low back pain warranted medical treatment beyond October 1987. I also find Mr. Wheeler is entitled to reasonable, appropriate, and necessary medical care and treatment as his low back injuries of May 10, 1978 and June 29, 1979 may require.

### **ATTORNEY FEE**

Section 28 of the Act, 33. U.S.C. § 928, permits the recoupment of a claimant's attorney's fees and costs in the event of a "successful prosecution." Since I have determined that Mr. Wheeler is entitled to continued reasonable and necessary medical treatment, Mr. Swyers, claimant's counsel, is entitled to recoup his fees and costs for his professional work before the Office of Administrative Law Judges. Mr. Swyers has thirty days from receipt of this decision and order to file an application for attorney fees and costs as specified in 20 C.F.R. § 702.132 (a). The other party has ten days from receipt of such fee application to file an objection to the request.

### **ORDER**

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order:

1. The Employer's Motion to Dismiss the Claimant's modification request as untimely is **GRANTED**.
2. The Employer shall furnish such reasonable, appropriate, and necessary medical care and treatment as the Claimant's low back injuries of May 10, 1978 and June 29, 1979 may require, including periodic physician evaluations and medication.

3. The Employer shall receive credit for all prior medical treatment reimbursements..

**SO ORDERED:**

RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Washington, DC